87-1386

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PAUL DAYTON,

Petitioner,

against

CZECHOSLOVAK SOCIALIST REPUBLIC AND CENTROTEX COMPANY LTD., *also known as* CENTROTEX FOREIGN TRADE COMPANY, LTD.

Respondents,

JOSEPH E. STIASSNI; CHRISTINE GERLI AND WILLIAM HANDELMAN, EXECUTORS OF THE ESTATE OF CHARLES STIASSNI; SUSAN MARTIN; PAUL N. MARTIN; ANDREW J. MARTIN; STEPHEN L. MARTIN; CHRISTOPHER J. MARTIN,

Petitioners,

against

CZECHOSLOVAK SOCIALIST REPUBLIC AND CENTROTEX COMPANY, LTD., *also known as* CENTROTEX FOREIGN TRADE COMPANY, LTD.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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February 16, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Should this court, prior to granting or denying this petition for certiorari, invite the Solicitor General of the United States to file a brief expressing the views of the United States Government on whether the granting of this petition is warranted?

2. Does the treaty exception to the act of state doctrine in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 at 428 ("Sabbatino"), apply in this case?

3. If it does not, should Sabbatino, as it relates to the expropriation or other taking of property without compensation, be reconsidered?

4. Where a foreign state defendant, served diplomatically under section 1608(a)(4) of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), refuses to appear or defend, claiming "absolute" sovereign immunity in diplomatic notes, and urging the Department of State, unavailingly, to suggest dismissal of the lawsuit to the District Court, can the silence of the Executive branch serve as a basis for the Appeals Court to uphold the denial by the District Court of a motion for the entry of a default judgment, albeit the elements of an otherwise valid complaint had been found to exist?

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Stiassni et al. v. The Czechoslovak Socialist Republic, et al., U.S. Ct. App. for the District of Columbia, December 8, 1987. Not reported.

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No.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit ("Appeals Court") entered in this proceeding on December 8, 1987.

OPINIONS BELOW

The Appeals Court opinion, not yet reported, is set forth in the appendix, App. 1a. The opinion of the United States District Court for the District of Columbia ("District Court"), and its order entered on December 19, 1986, not reported, are set forth in the appendix, App. 1b and 1c.

JURISDICTION

The judgment of the Appeals Court was entered on December 8, 1987. This petition for certiorari is filed within ninety days thereafter. The Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND INTERNATIONAL AGREEMENTS INVOLVED

These consolidated cases involve the provisions of (1) the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Secs. 1330, 1602-1611; (2) Tit. IV, International Claims Settlement Act of 1949 ("1949 Act"), 22 U.S.C. Sec. 1642; (3) Czechoslovakian Claims Settlement Act of 1981, ("1981 Act"), Pub. L. 97-127, Sec. 6, 95 Stat. 1675, 1677, reprinted in 22 U.S.C. note prec. Sec. 1642 (1981); and of the following international agreements: (1) Settlement Agreement of November 6, 1981, between the United States and Czechoslovakia ("Settlement Agreement"), 21 I.L.M. 371; (2) Agreement of November 14, 1946, between the United States and Czechoslovakia relating to commercial policy ("1946 Agreement"), 61 Stat. (3) 2341, TIAS 1568 (1946).

STATEMENT OF THE CASE

Actions were commenced, and consolidated, against two defendants: (1) The Czechoslovak Socialist Re-

public ("Republic"), a foreign state; and (2) its instrumentality, Centrotex Company, Ltd., aka Centrotex Foreign Trade Company, Ltd. ("Centrotex"), a textile trading company created by the Republic, having, *inter alia*, a monopoly right to import all raw materials for, and export the products of, all nationalized textile mills in Czechoslovakia, including mills formerly owned by the petitioners. This petition is confined to that portion of the Appeal Court's judgment and order affirming the denial by the District Court of a motion to enter a default judgment against the Republic and dismissing the complaints against it. Although warned diplomatically by the Department of State of the potentiality, under American law, of the entry of a default judgment, the Republic neither appeared nor pleaded in this action, adopting, in lieu thereof, a practice of asserting and reiterating its claimed "absolute" sovereign immunity, in diplomatic notes to the Department of State, copies of which it sent, by mail, to the District and Appeals Court, respectively.

The gravamen of this consolidated action is the taking, *without compensation*, by the Republic of the textile production mills in Czechoslovakia owned by the petitioners or their predecessors. The applicable Czechoslovak nationalization decree, explicitly providing for compensation promulgated by the Republic (then headed by Edward Benes) was dated October 25, 1945. Petitioners, and their predecessors, not then citizens of the United States, became citizens of the United States prior to (1) November 14, 1946, when a commercial policy agreement was entered into between the United States and Czechoslovakia, providing, *inter alia*, that the Republic "make adequate and

effective compensation" for the nationalization of the property of United States citizens; and (2) February 26, 1948, when a Communist regime gained control in Czechoslovakia and repudiated the formal undertaking by Czechoslovakia to pay compensation, thereby giving rise to a claim in international law.

Petitioners thus are members of a special group of United States citizens referred to by the Congress and the Executive branch as "Benes" claimants. Following the 1946 Agreement, a complex process of intermittent negotiation ensued, including United States statutes, and preliminary agreements between the United States and Czechoslovakia, as a consequence of which Benes claimants were excluded from the ultimate (1981) intergovernmental lump sum Settlement Agreement but were granted "ex gratia" payments, out of administrative funds, by the Congress in the 1981 Act. Thereafter, these suits, later consolidated, were commenced, jointly and severally, against the Republic and Centrotex.

The treaty exception in *Sabbatino,* 376 U.S. at p. 428, — the Court there stating that judicial abstention was warranted only in the "absence of a treaty or other unambiguous agreement regarding controlling legal principles"—arises, in this case, because of the following language in Par. 7 of the 1946 Agreement:

> "The Government of the United States and the Government of Czechoslovakia will make adequate and effective compensation to the nationals of one country with respect to their right or interests in properties which may have been or may be nationalized or requis-

itioned by the Government of the other country. . ."

Two issues bear upon whether a default judgment against the Republic was required to be entered: (1) Whether, despite its default, the Republic was entitled to dismissal because of sovereign immunity under the FSIA; (2) Whether the act of state doctrine, as stated in *Sabbatino,* was applicable, despite the treaty exception. The first issue is jurisdictional and necessitates construction of the FSIA. The second is a rule of judicial forbearance, with exceptions, established by this Court.

Sec. 1605(e), FSIA, provides that no default judgment can be entered against a foreign state unless the claimant has "established his claim or right to relief by evidence satisfactory to the court." Denying petitioners' motion to enter a default judgment against the Republic and including the Republic *within Centrotex's motion to dismiss,* the District Court, as appears in App. 1b, found, explicitly or by necessary implication:

1. The Republic nationalized or otherwise took [petitioners'] ownership interests in textile production plants in Czechoslovakia.

2. The Republic repudiated its undertaking to pay compensation for such taking.

3. The value of [petitioners'] property, when so taken, was adjudicated by the Foreign Claims Settlement Commission, a quasi-judicial agency of the United States ("Commission"), and awards rendered pursuant to the provisions of the 1981 Act, and [petitioners] received "ex gratia" partial payment on such awards from the United States Treasury.

[Petitioners'] lawsuits sought recovery of "the unpaid balance" of such awards on the theory of unjust enrichment.

4. [Petitioners] became citizens of the United States prior to the February 26, 1948 Communist repudiation of the Republic's undertaking to pay compensation, which repudiation might have constituted a separate "taking" of [petitioners'] property "in violation of international law", a question not determinable on a motion to dismiss.

5. The Republic was appropriately served through diplomatic channels.

6. No appearance was made by the Republic. No answer or other pleading by the Republic was filed.

7. The Republic engaged in commercial activity in the United States, as defined in 28 U.S.C. Secs. 1603(d) and (e), with the fruits of [petitioners'] nationalized property.

8. The [petitioners] had no effective remedy in Czechoslovakia for losses suffered as a consequence of the actions of the Republic.

The Republic disregarded American law and procedure, and the default warnings of the Department of State served on it on April 29, 1985, and pursued the diplomatic route of urging the American Embassy in Prague and/or the Department in Washington, to communicate to the District Court and the Appeals Court, as the case might be, the "interest" of the United States Government in dismissal of the litigation. When the Department declined to accede to the Republic's request, stating that United States law required that sovereign immunity and other defenses,

if any, be asserted in the courts under established court procedure, the Republic's Consul General in the United States, while continuing to disclaim the District Court's jurisdiction for any purpose, forwarded copies of the Republic's diplomatic notes by ordinary mail directly to the District court, without service on [petitioners]. [Petitioners'] original motion for entry of default judgment was filed on October 11, 1985. The District Court on November 1, 1985, referring to its "reluctance" to enter a default judgment against a foreign sovereign, ordered *inter alia,* that the matter be held, in effect, under advisement. As of December 19, 1986, the date of the District Court's denial of [petitioners'] renewed motion to enter a default judgment, the Republic had been knowingly in default for approximately 500 days.

Nor did the Republic enter an appearance in the Appeals Court. Attorneys for Centrotex had entered an appearance in the District Court on July 18, 1986, thereafter filing a motion to dismiss on behalf of Centrotex alone. In its brief in the Appeals Court, Centrotex disavowed speaking for the Republic. Referring to [petitioners'] Notice of Appeal of January 15, 1987, the Republic again sent a diplomatic note to the Department of State on March 13, 1987, denying the jurisdiction of the Appeals Court "under generally recognized principles of international law", and requesting the "United States Government to take appropriate measures to dismiss" these actions, stating as the sole ground for the Republic's request, —

> ". . .the property of the [petitioners] or their legal predecessors was in accordance with Czechoslovak law legally nationalized as the property of Czechoslovak citizens and with-

> out compensation transferred to the possession of the Czechoslovak state".

The reply, if any, of the Department of State is not known to the petitioners.

On March 16, 1987, the Republic's Consul in the United States sent a letter to the Appeals Court, attaching a copy of its aforesaid diplomatic note of March 13, 1987, stating that the Consul had the authority "to object the lack of jurisdiction of the U.S. courts (including the Court of Appeals) to hear these cases". The communication was refused acceptance. The Consul then wrote directly, on June 26, 1987, to the Chief Judge of the Appeals Court, enclosing the previously rejected statement, and stating that "the Czechoslovak Socialist Republic does not wish to appear before the Court in these cases owing to the lack of jurisdiction of the U.S. Courts to hear them". The Appeals Court ordered, *sua sponte*, that the material previously returned now be "lodged", adding, "The Court defers any action on the request to dismiss contained in the statement, pending the briefing and argument of the appeal by the appellants and appellee Centrotex". At no time did the Appeals Court invite the Department of State to submit its views on any aspect of the case.

REASONS FOR GRANTING THE WRIT

I. BY DEFAULTING, THE REPUBLIC WAIVED THE DEFENSE OF SOVEREIGN IMMUNITY.

Whatever the merits of the District Court and the Appeals Court conclusions that Centrotex, an admitted instrumentality of the Republic, was entitled to sovereign immunity, neither court found *the Republic*

to be entitled to sovereign immunity. The Republic, in principle, bore the burden of establishing this affirmative defense, H.R. Rep. No. 94-1487, 94th Cong., 2nd (Sess. (1976), *reprinted in* 1976 U.S. Code Cong. and Ad. News 6604-6631; *Vencedora Oceanica Navigacion, S.A.* v. *Campagnie Nationale Algerienne de Navigacion* 730 F(2) 195, 199 (5th Cir., 1984); *Von Dardel* v. *Union of Soviet Socialist Republics,* 623 F.Supp. 24 (D.D.C., 1985); and the Republic had intentionally defaulted. But the Appeals Court nevertheless affirmed the District Court's denial of a default judgment against the Republic and dismissal of the complaint against it on the ground that it was compelled to do so by the act of state doctrine, a judicial policy of restraint which could not be "waived" by a foreign state, whether by default or otherwise. The "treaty exception" to the act of state doctrine, as propounded in *Sabbatino,* was, the Appeals Court ruled, inapplicable. In this, as appears below, the Appeals Court was in error. If it was not in error, the emergent question is whether this Court should reconsider *Sabbatino.*

II. THE ACT OF STATE DOCTRINE STATED IN *SABBATINO* WAS INCORRECTLY APPLIED BY THE LOWER COURT IN DENYING DEFAULT JUDGMENT, AND DISMISSING THE COMPLAINT, AGAINST THE REPUBLIC. IF THE DOCTRINE WAS CORRECTLY APPLIED, IT IS RIPE FOR RECONSIDERATION.

The petitioners contended below that the act of state doctrine as stated in *Sabbatino* required that the treaty exception be given effect. If not given effect, the lower court decisions again raise significant and recurring problems as to *Sabbatino,* warranting resolution by this Court.

Sabbatino was decided in 1964. The FSIA legislatively embodying a change of Executive branch policy as to sovereign immunity, was enacted in 1976, the same year in which this Court ordered that the parties brief and orally argue whether *Sabbatino* should be reconsidered. *Alfred Dunhill of London, Ltd.* v. *Republic of Cuba,* 425 U.S. 682 (1976) ("Dunhill"). Briefs for the United States, as *amicus curiae* in *Dunhill,* which followed, argued that *Sabbatino* should be reconsidered. The Court, on the merits, ultimately found that it was not necessary to reconsider *Sabbatino* since an act of state had not occurred, *Dunhill,* at 690. Deferred, the question of reconsideration necessarily persists.

A thorough account of the act of state doctrine, as of 1986, reviewing the relevant cases since the 1964 *Sabbatino* decision, including "Dunhill", emphasizing mounting confusion and uncertainty in the application in practice of *Sabbatino* is found in Bayzler, *Abolishing the Act of State Doctrine,* 134 U. of Pa. L. Rev. 327-398 (1986) ("Bayzler"): "Courts are hopelessly confused as to the scope of the doctrine, and more often than not use the doctrine to avoid deciding difficult cases" (p. 398). Legislative solutions have been sought. See Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law,* 79 Am. J. Int'l Law 68 at 89-91 (1985). The action, or lack of action, of this Court has been significant. Since *Sabbatino,* this Court has declined to apply the act of state doctrine. Moreover, the Executive branch, since *Sabbatino,* has *never* advised the courts to apply the act of state doctrine in a particular case. Feldman, *Foreign Sovereign Immunity in the United States Courts, 1976-1986,* 19

Vand. J. of Trans. L. 19 (1986), ("Feldman"), citing, at n. 130, cases—at least five—involving a variety of circumstances, in which the Executive branch has advised the courts that the act of state doctrine *should not* be applied. The American Bar Association has proposed to Congress, and supported, the adding of a section to the FSIA to read as follows (for an account of this proposal, see Feldman at pp. 48-52, 54-58):

> ". . .The Federal act of state doctrine shall not be applied on behalf of a foreign state with respect to any claim or counterclaim which is based upon the expropriation or other taking of property . . . without the payment of prompt, adequate and effective compensation or otherwise in violation of international law."[1]

But Bayzler, at p. 396, states that the Court, rather than the Congress, is "in the best position to abolish the act of state doctrine"; and Feldman, concludes, at p. 49: "Efforts to abolish the doctrine by legislation have foundered on the complexities."

Petitioners relied below on the treaty exception to the act of state doctrine. Restatement (Revised), Foreign Relations Law Of The United States, Sec. 469 (Tent. Draft No. 7, 1986) ("Restatement"), and its comments and reporters notes, serve to outline the problem of the doctrine's applicability to this case: what does the Sabbatino formula, "unambiguous agreement regarding controlling legal principles", mean? The subsidiary questions are multiple. Can

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[1] S. 1071, 99th Cong. 1st Sess. 2 (1985); H.R. 3137, 99th Cong., 1st Sess. (1985).

"unambiguous" be taken to refer to the ultimate merits of the litigation at hand, thereby positing a hypothetical certainty in outcome *prior* to trying the facts? Or is it confined to the clear affirmation between the two nations involved of a *right* to adequate and effective compensation for the taking of property, thereby obviating the *Sabbatino* Court's concern in 1964 that there was a lack of consensus among nations on the vital principle of the obligation to compensate—e.g., a Communist country might state that it recognized no such obligation on the part of the taking country, *Sabbatino* at p. 429? Is this concern realistic in 1988? Other questions are noted below.

Since Sabbatino, this Court has not expressed its views. The Restatement notes (Comment b):

> "As of 1985, The Supreme Court, has not passed on the applicability of the [act of state] doctrine to an act of a foreign government . . . alleged to violate a provision of a treaty or other unambiguous agreement. . ."

The Fifth Circuit has aptly stated that underlying *Sabbatino* has been a "pessimism about the competence of the judiciary to ascertain norms of international law"; or a reluctance to having American courts engage in "the dubious practice" of "evaluating [foreign acts of state] against the potentially parochial norms of American public policy". *Callejo* v. *Bancomer*, S.A. 764 (2) 1101 at 1116 (5th Cir., 1985). Since *Sabbatino*, the Courts have, in practice, solicited, or otherwise relied upon, the views of The Department of State as to whether judicial abstention was or was not necessary to effectuate the foreign policy of the United States.

A prime example of judicial application of the treaty exception, following the submission of a supporting *amicus curiae* brief by the Executive branch, is *Kalamazoo Spice Extraction Co.* v. *The Provisional Military Government of Socialist Ethiopia*, 729 F(2) 422 (6th Cir., 1984) ("Kalamazoo Spice"), where the Sixth Circuit held that a provision in a 1953 commercial policy agreement between the United States and Ethiopia requiring payment of compensation for the taking of property by Ethiopia was *ipso facto* the "controlling legal standard" for applying the treaty exception. Examples of some sixteen other treaties and the similar compensation language used therein, are listed in the *Kalamazoo Spice* appendix(pp. 428-430, n. 4). Also (at pp. 427-428):

> "An adjudication in this matter, would not interfere with any efforts of the Executive branch . . . The Executive branch intervened in this matter through the Departments of State, Treasury and Justice, who have filed a joint amicus brief urging that the 1953 Treaty of amity [between the United States and Ethiopia] makes the act of state doctrine inapplicable. Obviously the Executive branch feels that an adjudication in this matter is appropriate. Thus the Supreme Court's concern in *Sabbatino* for judicial interference with foreign policy activity by the Executive branch is not a consideration in this case."

Despite repeated diplomatic demand upon the Department of State by the Republic that the Department inform the courts that the present case should be dismissed, the Department, after warning the Republic that a default judgment could be rendered, did

not honor the Republic's request. In a letter from the Legal Adviser of the Department of State to the Solicitor General, dated November 19, 1982, ("Kalamazoo letter") the Department expatiated upon the effect to be given by the courts on *Sabbatino* foreign policy concerns in the case of either (1) the Department informing the court in a given case as to its views; or (2) the Department failing to inform the court. (The text of this letter, appearing in 22 I.L.M. 207 (Vol. XXII, #1, January, 1983, is appended hereto as App. 2). The concluding sentence of the Kalamazoo letter is ". . . we . . . anticipate, that silence of the part of the Executive would not be relied upon as a basis for judicial abstention under the Act of State doctrine".

Had the Appeals Court, despite the Kalamazoo letter, desired further "direction from the political branches" as to the sufficiency of the 1946 Agreement to "dislodge the act of state doctrine" it could, *inter alia*, have invited the Executive branch to submit an *amicus curiae* brief as it did in *Practical Concepts, Inc.* v. *Republic of Bolivia*, 811 F(2) 1543, n. 2, 21 (D.C.Cir., 1987) ("Practical Concepts"). After oral argument in *Practical Concepts*, the Appeals Court withheld disposition and invited the views of the United States, which views were presented pursuant to 28 U.S.C. Sec. 1317. Although *Practical Concepts* was a sovereign immunity, and not an act of state, case, the Appeals Court's invitation to the Executive branch should have been adopted, by parity of practice, if, reading *Sabbatino*, it deemed a "direction from the political branches" desirable. The two doctrines are related. "Both the act of state doctrine and the doctrine of sovereign immunity are

based on considerations of the sovereign independence and equality of states, and on perceived limitations on the authority of domestic courts of one state to judge the activities of another state". Restatement, Rep. Note 11.

In *Sabbatino,* an act of state case, this Court, prior to acting on the petition for certiorari filed therein, invited the Solicitor General to express the views of the United States as to whether the writ should be granted. The Solicitor General responded in a Memorandum for the United States, stating, *inter alia,* "We believe that this case is one which warrants review by this Court". O.T. 1963, vol. 9, no. 16. Whatever the views of the United States may be on the present case, the passage of time, the maturing of the issues, the views of legal scholars and of the American Bar Association, justify the issuance of a similar invitation in 1988.

Should the treaty exception to the act of state doctrine stated in Sabbatino continue to be left by this Court, in 1988, to the uncontrolled discretion of the lower courts without guidance as to when a treaty or other agreement is "unambiguous" or "clear"? What "legal principles" are to be considered as "at stake", and which are "controlling? What role should the Judiciary have in the exposition and development of the principles of international law? What weight should be given to the views of the Executive branch when expressed? What significance should be attached to silence by the Executive branch when requested by a foreign state to advise the courts that litigation, to which the foreign state is a party under FSIA, should be dismissed? These are some of the questions which this Court should consider in light of the Appeal

Court's statement that the case against the Republic presents a "prime case for invocation of the act of state doctrine" in a "paradigmatic" setting. In reality, this case against the Republic does not differ in material regard from *Kalamazoo Spice* where the Sixth Circuit reached a contrary view, amply supported by the Executive branch. The conflict between the circuits as the applicability of the treaty exception appears to be complete.

The questions as to the treaty exception may also, after nearly a quarter of a century of "confusion" and "uncertainty", warrant the reconsideration of *Sabbatino*. A persistent and informed view supports change.[2] If needed to resolve the issues in this case, the Court should not hesitate to reconsider *Sabbatino*. Action by this Court to establish judicially the principles of the American Bar Association proposed legislative amendment to the FSIA, *supra*, is overdue.

CONCLUSION

For these reasons, we respectfully pray, a writ of certiorari should issue to review the judgment and

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[2] This included the Department of State as early as 1975. Attached as Appendix 1 to the Opinion of the Court in *Dunhill*, is a letter dated November 26, 1975, from the Legal Adviser, speaking for the Department of State, to the Solicitor General, which, on the premise that the Court might reach the question of whether the *Sabbatino* holding should be reconsidered, reviewed developments in the law, domestic and foreign, since *Sabbatino*, and concluded,

"In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in *Sabbatino* so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States."

opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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February 16, 1988

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7019

PAUL DAYTON, APPELLANT

v.

CZECHOSLOVAK SOCIALIST REPUBLIC, et al.

No. 87-7020

JOSEPH E. STIASSNI, et al., APPELLANTS

v.

CZECHOSLOVAK SOCIALIST REPUBLIC, et al.

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 85-00032 and 85-00360)

Argued November 2, 1987

Decided December 8, 1987

Samuel Herman for appellants.

Peter D. Ehrenhaft and *Stephen M. Boyd* for appellees.

Before: RUTH B. GINSBURG and STARR, *Circuit Judges* and GESELL,* *District Judge.*

Opinion for the Court filed by *Circuit Judge* RUTH B. GINSBURG.

GINSBURG, Ruth B., *Circuit Judge*: Plaintiff-appellants claim entitlement to compensation for the nationalization of textile production plants in Czechoslovakia once owned by them or their predecessors-in-interest. The district court dismissed their complaints; it held the defendants—Czechoslovakia and a Czechoslovakian state trading company (Centrotex)—immune from suit. Furthermore, even if the foreign sovereign immunity bar could be surmounted, the district court declared, the act of state doctrine would preclude inquiry by a United States court into the validity of the alleged taking. *Dayton v. Czechoslovak Socialist Republic*, —— F. Supp. —— (D.D.C. 1986).[1] We affirm the district court's judgment.

I.

As recounted in the district court's opinion, on October 25, 1945, the Czechoslovak government, then led by President Eduard Benes, nationalized various industries within Czech borders. The property nationalized included

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] The district court also found that service on Centrotex—although not on Czechoslovakia itself—was defective, that the applicable District of Columbia statute of limitations had expired, and that deference due to the international claims settlement accomplished by the political branches counseled against judicial intervention. We do not reach, and express no opinion on, these additional bases for dismissing the complaints.

textile production plants owned by plaintiff-appellant Paul Dayton and by the predecessors of the Stiassni plaintiff-appellants. The Benes government promised to compensate the former owners for their loss. On February 26, 1948, however, before the Benes government had fulfilled this pledge, a Communist regime gained control and repudiated its predecessor's promise.

Dayton and the predecessors of the Stiassni plaintiff-appellants were Czech citizens at the time of the Benes regime's 1945 nationalization decree. They became United States citizens, however, prior to the advent of the Communist regime in 1948. A protracted claims settlement process between the two nations followed in the wake of the nationalization decree, pursuant to an Agreement Relating to Commercial Policy, Nov. 14, 1946, 61 Stat. 2431, TIAS No. 1569 (1946 Agreement), in which Czechoslovakia undertook to "make adequate and effective compensation" to United States nationals for property nationalized by the Czech government. Plaintiff-appellants have urged, since at least 1949, that they should be treated as United States nationals, for purposes of gaining compensation, to the same extent as those who were United States citizens on the October 25, 1945 date of the Benes nationalization decree. Their pleas have achieved only limited success.

In 1981, a claims settlement agreement for $81.5 million was reached between the Czech and U.S. governments, Agreement on the Settlement of Certain Outstanding Claims and Financial Issues, 21 I.L.M. 371 (1982); this agreement excluded all claimants who had not been United States citizens on the date their property was nationalized. Congress, however, took account of the omission of "Benes claimants"—persons who, like appellants, were Czech citizens at nationalization in 1945, but had become U.S. citizens before the Communists came to power in 1948. Focusing on the situation of these claim-

ants, Congress interpreted the settlement so that a portion of the funds would be used to afford them some compensation. Czechoslovakian Claims Settlement Act of 1981, Pub. L. 97-127, § 6, 95 Stat. 1675, 1677, *reprinted in* 22 U.S.C. note prec. § 1642 (1982). Appellants applied for and received payments pursuant to this measure; Dayton received approximately 12% of the amount at which the U.S. Foreign Claims Settlement Commission had valued his claim: the Stiassni claimants received approximately 13%.

In this consolidated litigation, commenced in 1985, plaintiff-appellants Dayton and the Stiassni claimants seek to recover from Czechoslovakia and the Czech textile trading company Centrotex the "unpaid balance" of their compensation claims. Centrotex appeared and raised several threshold objections to the two complaints. The government of Czechoslovakia refused to enter a formal appearance, but lodged diplomatic notes with the district court asserting total immunity from the adjudicatory authority of tribunals in the United States. The district court ultimately denied the plaintiffs' motions for the entry of default judgments against Czechoslovakia, and granted the motion of defendant Centrotex to dismiss the Dayton and Stiassni complaints.

II.

Centrotex, in its plea for dismissal, relied, *inter alia*, on the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1611 (1982), legislation enacted in 1976 to govern the sensitive matter of the amenability of a foreign nation, or an agency of a foreign nation, to suit in the United States. The FSIA provides that foreign states, and their agencies or instrumentalities, shall be immune from suit in federal or state court unless one of the exceptions enumerated in the Act applies. Plaintiff-appellants cite two exceptions: the

prescription on waiver of immunity, 28 U.S.C. § 1605 (a)(1); and the provision on "rights in property taken in violation of international law" where (1) "that property or any property exchanged for [it] is present in the United States in connection with a commercial activity carried on in the United States by the foreign state" or (2) the "property [or property exchanged for it] is owned or operated by an agency . . . of the foreign state and that agency . . . is engaged in a commercial activity in the United States." *Id.* § 1605(3).

The district court adequately explained why neither exception applies, *see* —— F.Supp. at ——, and we adopt that court's reasoning. In sum, we agree that no intelligent waiver of a foreign sovereign's immunity is fairly extracted from endowment of a state trading company with the capacity to sue and be sued. *See* H.R. REP. No. 1487, 94th Cong., 2d Sess. 15 (1976) (defining agency of foreign state to include any entity which, under the law of the foreign state of its creation, "can sue or be sued in its own name, contract in its own name or hold property in its own name"). We further agree that the property at issue—textile plants in Czechoslovakia—is not in the United States, nor is property exchange therefor, nor does the trading company Centrotex own or operate the plants or property exchanged for them. Finally, we agree that the district court had no warrant in this case to depart from the general rule that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983).

Even if appellants had an arguable claim that their case against one or both defendants fits under an FSIA exception, however, we would affirm the district court's judgment, for it is evident that the litigation cannot proceed in view of the act of state doctrine. *See* —— F.Supp. at ——. Under that doctrine:

> In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory . . . .

RESTATEMENT (Revised), FOREIGN RELATIONS LAW OF THE UNITED STATES § 469 (Tent. Draft No. 7, 1986) (adopting the principal contemporary formulation of the doctrine by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)).

Although Czechoslovakia has not appeared to defend against Dayton and the Stiassni claimants, the district court was not impeded from invoking the act of state doctrine to shelter both defendants for "the act of state doctrine is a judicial policy of restraint, [and its] application . . . cannot be 'waived' by the foreign state." RESTATEMENT, *supra*, § 469 comment e. Appellants' claims, we stress, present a prime case for invocation of the doctrine: the compensation pleas appellants tender invite examination of the validity of a taking by a foreign state of real property located within its own territory.

In face of this paradigmatic setting for the act of state doctrine, appellants invoke the "treaty exception." They argue that in the 1946 Agreement, Czechoslovakia unambiguously recognized an obligation to the United States, as claimant government, to provide, as international law instructs, adequate and effective compensation for taking property. Brief for the Appellants at 28. The Agreement, however, recognized a compensation obligation, not to all the world, but only to "nationals" of the United States, and the time reference for that term is not clearly stated in the Agreement; indeed, it is not stated at all. Recalling the Dayton and Stiassni claimants' own words, the district court observed that the 1946 Agreement 'contains no reference to *when the property owners became [United States] nationals for the purpose of being included in settlement coverage.*" —— F.Supp. at ——, quoting

Plaintiffs' Memorandum in Opposition to the Motion to Dismiss the Complaints at 21-22 (emphasis in original).

Lacking any direction from the political branches to count as the relevant date the 1948 repudiation of the Benes government's promise to compensate (a repudiation occurring some time after the concerned parties became U.S. citizens), rather than the 1945 date of the nationalization decree itself (a date when the plant owners were still Czech citizens), a federal court could not find and declare the Agreement "clear" as to controlling legal principle at stake. The insufficiency of the 1946 Agreement to dislodge the act of state doctrine is further indicated in the State Department's explanation of its refusal to espouse the claims of the Benes claimants:

> Under well-established principles of international law . . . the United States cannot espouse claims against foreign governments for injuries inflicted upon persons who were not U.S. citizens at the time of the injury. . . . [U]nder international law, the date of taking is fixed by the date of the expropriation decrees and/or the date of physical seizure, and not by a subsequent date of repudiation of an undertaking to provide compensation.

Letter from Richard Fairbanks, Assistant Secretary of State for Congressional Relations (Oct. 2, 1981), *reprinted in* S. REP. No. 211, 97th Cong., 1st Sess. 4-5 (1981). In sum, appellants would have the courts "examin[e] the validity of a taking by a foreign state of property within its own territory," RESTATEMENT, *supra*, § 469, but have demonstrated no unambiguous agreement or other cause justifying judicial intervention in this case. Accordingly, the complaints must stand dismissed with prejudice.

CONCLUSION

For the reasons stated, the judgment of the district court dismissing the Dayton and Stiassni claimants' complaints is

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL DAYTON,	)	
	)	
Plaintiff,	)	
	)	
v.	),	
	)	
THE CZECHOSLOVAK SOCIALIST REPUBLIC, *et al.*,	)	Civil Action No. 85-0032
	)	
Defendants.	)	
	)	
JOSEPH E. STIASSNI, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 85-0360
v.	)	
	)	
THE CZECHOSLOVAK SOCIALIST REPUBLIC, *et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM

I.

These cases involve claims for compensation arising from the nationalization of the plaintiffs' textile production plants by the government of Czechoslovakia. The plaintiffs are members of a group called the "Benes" claimants.

Their property was nationalized on October 25, 1945, by the regime of President Edward Benes who promised them compensation. Czechoslovak Nationalization Decree No. 100/45 *Sb.* Plaintiff Dayton became a citizen of the United States on July 25, 1946; the predecessors of the Stiassni plaintiffs became citizens on December 14, 1945 and January 21, 1946. On February 28, 1948, the Communists came to power in Czechoslovakia and refused to honor the promise of compensation extended by the Benes government.

In 1961 and 1962, the plaintiffs sought compensation for their losses under title IV of the International Claims Settlement Act of 1949, 22 U.S.C. § 1642. That Act authorized the foreign Claims Settlement Commission of the United States ("the Commission") to compensate U.S. nationals whose Czechoslovakian property was taken by using the proceeds of the sale of certain Czechoslovakian assets seized by the United States. However, the Commission denied the claims of the plaintiffs based on their findings that the plaintiffs had not been U.S. nationals on the date their property was nationalized.[2] Following awards to other U.S. citizens, the U.S. government participated in extensive negotiations with the government of czechoslovakia to obtain additional compensation. A claims agreement for $81,500,000 was finally reached between the Czechoslovakian and United States governments in late 1981. This agreement excluded any claimants who had not been United States citizens on the date their property was nationalized. However, Congress expressly altered the agreement to provide that a portion of the settlement should be used to compensate the Benes claimants. *See* Czecho-

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[2]*See In the Matter of the Claim of Mary Dayton and Paul Dayton*, FCSC Decision No. CZ-1022 (February 20, 1961); *In the Matter of the Claim of Charles Stiassni and Joseph Stiassni*, FCSC Decision No. CZ-3491 (June 29, 1962); *In the Matter of the Claim of Estate of Hermine Stiassni and Estate of Alfred Stiassni*, FCSC Decision No. CZ-3492 (June 29, 1962).

slovakian Claims Settlement Act of 1981 at §6, Pub. L. 97-127, Dec. 29, 1981, 95 Stat. 1675, *reprinted in* 22 U.S.C.A. Ch. 21, Sub. ch. IV. Pursuant to this congressional directive, the plaintiffs in these cases applied for, and received, some compensation for their losses.[2] The current law suits seek to recover the "unpaid balance" of their claims for compensation.

II.

Plaintiffs have sued the Czechoslovakian government and Centrotex which is a textile trading entity. A March 27, 1986 Order dismissed the complaints in accordance with a report from the United States Attorney, appearing as *Amicus Curiae*, that stated that service had not conformed with the applicable international conventions for the service of process on alien parties. After dismissal, the Department of State forwarded two copies of the complaints and translations to the American Embassy in Prague, which delivered them to the Czechoslovakian Foreign Ministry there. An April 28, 1986 Order granted the motion to vacate the order of dismissal. No answer has been received from the Czechoslovakian government. However, defendant Centrotex filed a motion to dismiss the complaint on September 8, 1986. This motion, and the plaintiffs' motion to renew an earlier motion for entry of default against Czechoslovakia are currently before the Court. A hearing was held on these motions on November

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[2]The Commission determined that plaintiff Paul Dayton was entitled to $601,167 in principal and $459,289.94 in interest for the nationalization of his textile interests. *See* Complaint at ¶10 and Exhibits A & B. On July 22, 1983, the Treasury Department paid Mr. Dayton a total of $125,114.00 on that award (approximately 12%). The Commission also determined that the Stiassni claimants were entitled to a total of $2,000,000 in principal and a total of $1,890,000 in interest. *See* Complaint at ¶10 and Exhibits A, B, C, & D. On July 20, 1983, the Treasury paid these plaintiffs a total of approximately $500,444.80 on that amount (approximately 13%).

5, 1986. For The reasons discussed below, the defendant's motion to dismiss the complaints will be granted and plaintiffs' motion for entry of default will be denied.

III.

Centrotex argues that while the complaints may have been properly forwarded to the Czechoslovakian government, they still have not been properly served on Centrotex. It is undisputed that Centrotex has received copies of the complaints.[3] Nonetheless, Centrotex argues that the provisions of the Foreign Sovereign Immunities Act were not complied with since translated copies of the complaints was not delivered to an agent or officer of Centrotex in the United States or forwarded to Centrotex through the Ministry of Justice of Czechoslovakia. 28 U.S.C. § 1608(b). Centrotex also argues that it received the complaints *before* they was dismissed and that the plaintiffs were obliged to *re-serve* the complaints after the dismissal was vacated.

The Centrotex claim that the complaints must be re-served is without merit. However, plaintiffs offer no response to the failure to effect service through the Ministry of Justice. This failure is a basis for dismissal of the complaints. If there were not other dispositive defenses mounted here, the Court would be reluctant to rest a dismissal on such a technicality. But as developed below, there are more satisfying alternate grounds for dismissal.

IV.

Claims by United States citizens against instrumentalities of foreign governments are governed by the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602, which provides that such entities are immune from the jurisdiction of the United States courts unless one of the

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[3] On August 27, 1985, Mr. Jiri Koutnik, the President of Centrotex, filed a memorandum "In Answer" to the plaintiffs' complaints.

statutory exceptions applies. Plaintiffs allege that their complaints falls under § 1605(a)(3) which provides for an exception where "rights in property taken in violation of international law are in issue" if that property "is owned or operated by an agency or instrumentality of a foreign state" that is "engaged in commercial activity in the United States."

Defendant has two arguments why plaintiffs have failed to surmount the FSIA. First, defendant points out that in order to sue a foreign instrumentality under the § 1605(a)(3), the plaintiff must allege that the property was taken "in violation of international law." Defendant argues that it is not a violation of "international law" for a state to take the property of one of its own citizens. The commission has already determined that plaintiffs were Czechoslovakian citizens on October 27, 1945, the date their property was nationalized. *See supra* at n. 1. Therefore, according to Centrotex, there is no possible violation of "international law." This argument, however, fails to recognize that the nationalization of the plaintiffs' property proceeded in two steps. There was no violation of international law in 1945 when the government nationalized the property of its citizens and promised to compensate them. When the government repudiated this promise in 1948, however, the plaintiffs were American citizens. This repudiation of the promise to compensate may constitute a separate "taking" of the plaintiffs' property which was in violation of "international law." This issue can not be resolved on a motion to dismiss.

Defendant's second argument under the FSIA is more persuasive. The Act requires that the property at issue be owned by an instrumentality of a foreign state that is engaged in commercial activity in the United States. While defendant Centrotex concedes that it is an instrumentality of a foreign state that engages in commercial activity in the United States, it argues that it does not own the textile plants in question or any textile plants. Rather, an

affidavit of Miroslav Otta (attached to the Defendant's Motion to Dismiss) states that Centrotex is engaged solely in the purchase and sale of textiles. According to this affidavit, Centrotex is a joint stock company whose shareholders are the National Commercial Bank, eleven "trusts" made up of individual textile production enterprises, and sixty textile and garment producing enterprises.[4] Otta Affidavit at ¶5. Centrotex obtains raw materials for these enterprises and purchases their products for resale to customers through foreign sales representatives. It does not, however, *own* the factories in question here, or any other textile production facilities.

Plaintiffs' response to this jurisdictional argument is not convincing. They argue that Centrotex is an essential part of the planned socialist economy of Czechoslovakia; without it, the government owned textile production enterprises would not be able to trade in international markets. According to the plaintiffs, "Centrotex, far from being an independent juristic personality, a mere 'commodity trader', is an alter ego of the Czechoslovak Socialist Republic in the effectuation and implementation of its nationalization of the Czechoslovak textile industry including the textile plants of the plaintiffs." Plaintiffs' Opposition to the Motion to Dismiss at 10. Plaintiffs therefore urge this Court to "pierce the corporate veil" in order to avoid injustice. In support of this proposition, plaintiffs cite to *First National City Bank v. Banco Para El Commercio Exterior de Cuba, (Bancec)* 462 U.S. 611 (1983), in which the Supreme Court held that a state owned Cuban bank could be held liable for a nationalization claim against the government of Cuba. Plaintiffs argue that the *Bancec* case authorizes this Court to find Centrotex jointly and severally liable for the actions of the Czechoslovakian gov-

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[4] These production enterprises are supervised by the Ministry of Industry; their managing directors are appointed by the "Office of the Textile Industry." Otta Affidavit at ¶ 6.

ernment. However, in *Bancec*, the Cuban bank sued in the United States to recover on a claim against First National City Bank; the American bank then raised the nationalization claim as a *counterclaim*. The holding of *Bancec* is heavily dependant on this unique fact situation; as the Supreme Court noted in conclusion,

> [Our decision] is the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law.

Id. at 633-34. In this case, neither defendant has availed itself of the benefits of the United States courts. In this situation, therefore, the Court should apply the general rule articulated by the Supreme Court that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-27.

Thus, 28 U.S.C. § 1605(a)(3) does not give this Court jurisdiction over the plaintiffs' claims against Centrotex. At oral argument in this case, however, counsel for the plaintiffs suggested that 28 U.S.C. § 1605(a)(1), which provides that the sovereign immunity of a foreign instrumentality can be waived, establishes a separate basis for jurisdiction under the FSIA. According to this theory, the government of Czechoslovakia waived the sovereign immunity of Centrotex when it provided the company with the capacity to "sue and be sued." *See* Otta Affidavit at §5. This argument was also advanced in a post-hearing memorandum filed by the plaintiffs on November 17, 1986. Since this basis for jurisdiction is not alleged in the complaints, it would be necessary for the plaintiffs to amend their complaints in order to proceed under this theory. More importantly, defendant's response to this post-hearing memorandum demonstrates that Congress intended to

extend sovereign immunity to all foreign state instrumentalities endowed with the capacity to sue and be sued when it enacted the FSIA. Section 1603(a) of the Act defines "foreign state" to include an agency or instrumentality of a foreign state as defined in Section 1603(b). Section 1604 provides that a foreign state "shall be immune from the jurisdiction of the courts of the United States . . . except as provided in sections 1605 to 1607." Moreover, the legislative history to § 1603 establishes that entities with the capacity to "sue and be sued" were included within the protections of §1604. The House Report on the FSIA states:

> (b) *Agency or instrumentality of foreign state.* Subsection (b) defines an 'agency or instrumentality of a foreign state' as any entity (1) which is a separate legal person, (2) which is an organ of a foreign state or of a political subdivision of a foreign state, or a majority of whose shares or other ownership interest is owned by a foreign state's political subdivision. . . .
>
> The first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can *sue or be sued in its own name,* contract in its own name or hold property in its own name.

H.R. Rep. No. 1487, 94th Cong. 2d Sess. 15. The plaintiffs' request to amend the complaints will therefore be denied.

V.

The sovereign immunity recognized in the FSIA is supplemented by the "Act of State Doctrine" which "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Na-*

cional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964). Unlike the doctrine of sovereign immunity, however, the Act of State doctrine is not jurisdictional. Instead, it is a "prudential doctrine designed to avoid judicial action in sensitive areas." *See IAM v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981). The policy of the Act of State doctrine has been expressed as follows:

> The doctrine . . . expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Sabbatino, 376 U.S. at 423. While this doctrine has been described as a form of federal common law, it has not been superceded by the enactment of the FSIA. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1113 n.12 (5th Cir. 1985); *IAM v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981). Moreover, it is directly applicable to claims arising out of nationalizations of property. As the Supreme Court has stated,

> [t]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

Sabbatino, 376 U.S. at 428.

The principles behind the Act of State doctrine are particularly applicable here. These cases arise over Czechoslovakia's nationalization of the property of persons who were citizens of that country at the time their property

was seized. Moreover, the Czechoslovakian nationalization program has been the subject of extensive negotiations between the United States and Czechoslovakia, negotiations which resulted in a large settlement. The plaintiffs themselves received some compensation out of that settlement. *See infra* at n.2. It would be inappropriate at this late date for a court to hold that the Czechoslovakian government or one of it instrumentalities should be exposed to further liability.

Plaintiffs argue that the Act of Sate doctrine should not be applied because there exists a "treaty or other unambiguous agreement regarding controlling legal principles," namely the November 14, 1946 agreement between the United States and Czechoslovakia which provided as follows:

> The Government of the United States and the Government of Czechoslovakia will make adequate and effective compensation to the nationals of one country with respect to their rights or interests in properties which may have been or may be nationalized or requisitioned by the Government of the other country. In this connection, the Government of the United States has noted with satisfaction that negotiations concerning compensation on account of such claims will shortly begin in Praha.

This agreement does provide that Czechoslovakia will compensate American citizens whose property was nationalized. However, as the plaintiffs themselves point out, the agreement "contains no reference to *when the property owners became such nationals for purpose of being included in settlement coverage.*" Plaintiffs' Memorandum in Opposition to the Motion to Dismiss the Complaints at 21-22 (emphasis in original). The agreement does not, therefore, establish an "unambiguous" controlling legal principle in this case. Furthermore, the issue of whether the

plaintiffs were covered under any negotiated agreements between the two countries was finally settled by Congress in 1981 when it provided for *ex gratia* payments to the Benes claimants. *See infra* at 13. The Act of State doctrine commands that this Court refrain from interfering with this policy determination by a separate branch of government.

Plaintiffs also argue that they do not seek to challenge the validity of a nationalization decree but instead seek restitution for "unjust enrichment," i.e., the failure of the present Czechoslovakian regime to honor the Benes commitment to pay compensation. However, this argument proves too much. Clearly, this Court lacks the power to return the plaintiffs' property to them; therefore the only possible remedy the plaintiffs could be seeking is damages. The Act of State doctrine can not be defeated by classifying all actions arising out of nationalizations of property as suits to remedy "unjust enrichment."

VI.

As mentioned above, the Benes claimants were not originally included in the 1981 settlement agreement. However, after the agreement had been initialed by both parties on November 6, 1981, Congress passed the Czechoslovakian Claims Settlement Act which approved the agreement with certain amendments. *See* Pub. L. 97-127, Dec. 29, 1981, 95 Stat. 1675, *reprinted in* 22 U.S.C.A. Ch. IV. Section 6(a) of the Act provided for *ex gratia* payments to be made to the Benes claimants. The statute explained that

> while the Commission had the authority to deny [the Benes claims] on the basis that the properties involved had been taken by the Benes Government while the claimants were not yet nationals of the United States, the effect of that denial is to withhold compensation to persons who

> have been United States citizens for many years and whose expropriated property has benefited the Communist Government of Czechslovakia no less than properties expropriated more directly and clearly by the Communist Government.

Id. at § 6(b). The plaintiffs in these actions therefore received payments in partial compensation of their loss out of the $81.5 million dollar settlement fund. However, plaintiffs argue that this settlement was not negotiated on their behalf and did not have the effect of extinguishing their claims.

The 1981 agreement states that it is in "full settlement and discharge" of

> All claims of the Government of the United States or nationals of the United States against the Czechoslovak Government based on measures of nationalization, expropriation, disposition or other restrictive measures involving takings of their properties, rights, and interests, or any other property, which arose prior to the date of entry into force of this Agreement.

Agreement on the Settlement of Certain Outstanding Claims and Financial Issues, entered into force February 2, 1982, Article 1, 21 I.L.M. 371 (1982). However, the agreement defines "the claims of nationals of the United States" as follows:

> those which are outstanding and unsettled claims . . . which, from the date of such nationalization or other taking to the date of entry into force of this Agreement have been continuously owned by individuals who are nationals of the United States. . . .

Id. at Article 2. This description may not cover the plaintiffs in these cases since their property was nation-

alized before they became United States citizens.[5] However, this language was drafted *before* Congress modified the agreement to provide for payments to the Benes claimants. Thus, it is fair to conclude that Congress expected any claims these plaintiffs had to be extinguished once they were included in the settlement agreement. In fact, the language from the statute quoted above suggests that Congress believed that the Benes claimants had no other way of obtaining compensation. *See supra*, at 13. This may account for Congress' failure explicitly to extinguish their claims.

While the words of the treaty may not cover the plaintiffs, they were included in the final distributions. Regardless of whether it acted to extinguish the plaintiffs' claims, therefore, the 1981 settlement agreement provides a further reason why the Court should abstain from hearing the plaintiffs' claims in these cases.

VII.

Finally, Centrotex argues that these suits are barred by the statute of limitations. The parties agree that the relevant statute of limitations in this case is three years.[6] It has now been over forty years since this property was nationalized. Plaintiffs argue that the delay is excusable because they were unable to pursue their claims while the U.S. government was "espousing" them through international negotiation. According to the plaintiffs, it was not

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[5] As noted earlier, however, it might be possible to view the 1948 repudiation of the earlier promise to compensate as a separate "taking" of the plaintiffs' property. *See supra* at 5-6.

[6] D.C. Code §12-301 prescribes the following limitations periods:

(2) for the recovery of personal property or damages for its unlawful detention - 3 years;

(3) for the recovery of damages for an injury to real or personal property - 3 years.

until the July 22, 1983 Treasury payment to the plaintiffs that their right to institute and carry through an action commenced. As defendant points out, this "espousal" theory is inconsistent with the plaintiffs' contention that they were not covered by the 1981 agreement which concluded the governments' negotiations. Furthermore, the 1961-62 decisions of the Commission established that the plaintiffs' property would be considered nationalized while they were still Czechoslovakian citizens for the purposes of any settlement agreement between the United States and Czechoslovakia. Thus, it should have been clear to the plaintiffs by 1962 that their claims were not being "espoused" by the United States government. For all these reasons, the accompanying order will grant defendant's motion to dismiss the complaints. The plaintiffs' motion to renew their earlier motion for entry of default against Czechoslovakia will therefore be denied.

Date: December 19, 1986 Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL DAYTON, Plaintiff, v. THE CZECHOSLOVAK SOCIALIST REPUBLIC, *et al.*, – Defendants.	)	Civil Action No. 85-0032
JOSEPH E. STIASSNI, *et al.*, Plaintiffs, v. THE CZECHOSLOVAK SOCIALIST REPUBLIC, *et al.*, Defendants.	)	Civil Action No. 85-0360

ORDER

For the reasons stated in the accompanying memorandum, it is this 19th day of December, 1986, hereby

ORDERED: that the motion of defendant Centrotex to dismiss the complaints should be, and hereby are, GRANTED; and it is further

ORDERED: that plaintiffs' motion to renew their motion for entry of default against the Czechoslovak Socialist Republic should be, and is hereby, DENIED; and it is further

ORDERED: that the complaints in these actions should be, and hereby are, DISMISSED.

Louis F. Oberdorfer,
United States District Judge

UNITED STATES: DEPARTMENT OF STATE LETTER WITH REGARD TO ACT OF STATE DOCTRINE AND FOREIGN EXPROPRIATIONS*

THE LOCAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

November 19, 1982

The Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Dear Mr. Solicitor General:

The Department of State has requested that the views of the United States be submitted to the United States Court of Appeals for the Sixth Circuit in a case styled *Kalamazoo Spice Extraction Co. v. The Provisional Military Government of Socialist Ethiopia.* This case involves an appeal from a decision by the United States District Court for the Western District of Michigan in which the District Court abstained from ruling on the merits of the suit because of the Act of State Doctrine. Two aspects of the decision are of concern to the Department of State—the Court's characterization of the Treaty of Amity and Economic Relations between the United States and Ethiopia as being too "general . . . and susceptible of multiple interpretation" to constitute an agreed legal standard capable of judicial application, and the significance attached by the Court to the absence of a "Bernstein letter" from this Department stating that adjudication would not be harmful to the conduct of foreign relations.

* [Reproduced from the text provided by the U.S. Department of State.]

We have worked closely with the Department of Justice in the preparation of a brief to convey to the Court of Appeals the views of the Executive Branch as *amicus curiae* on these two issues of special concern. The brief sets forth the reasons why the treaty provides a precise, administrable and, by agreement, governing rule of law. The brief also sets forth, partially in reliance upon this letter, why the courts should not infer from the silence of the Department of State that adjudication in this case would be harmful to the foreign policy of the United States. Since the latter issue involves the inferences to be drawn by the courts generally from actions of this Department I wish to make clear the practice that we intend to follow in cases like this.

As expressed in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the presumption that the courts should abstain from considering the expropriatory acts of foreign states appears to have reflected two major concerns of the Supreme Court. The first was that articulation by United States courts of an applicable international law standard for compensation would pose special difficulties, including a perceived risk of conflict with the Executive Branch's assertion of a governing legal standard in the conduct of foreign relations. The second of the Court's principal concerns was that adjudication could complicate the conduct of bilateral relations with the expropriating state—for example, by frustrating ongoing claims settlement negotiations between the two governments.

Where, as in the present case, there is an applicable treaty standard, the first of these concerns falls away. The second concern—potential interference with ongoing claims negotiations or other foreign relations interests—does not, in our view, warrant automatic abstention by the courts on Act of State grounds. As Legal Adviser Monroe Leigh wrote to the Solicitor General concerning foreign expropriations in 1975:

> In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. [Letter of November 25, 1975, *reprinted at* Appendix I to *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 706 (1976).] [15 I.L.M. 748 (1976)]

This experience of the past seven years has reinforced this conclusion. Accordingly, we believe that a broad, inflexible rule of abstention in expropriation cases is not necessary to safeguard our foreign policy interests. When, as in this case, there is a controlling legal standard for compensation, we believe that the presumption should be that adjudication would not be inconsistent with foreign policy interests under the Act of State Doctrine.

If, however, the Department of State determines in a given case that judicial abstention is necessary for foreign policy reasons, it will request the Department of Justice to communicate that determination to the appropriate court. Such a communication could be either in response to an inquiry from a court concerned about the foreign policy implications of the case before it or on the initiative of the Executive Branch. (Private litigants and foreign governments frequently bring cases to the attention of the Department of State which they believe raise Act of State concerns.) If we indicate that adjudication would be inconsistent with foreign policy interests of the United States, we trust that the court will give appropriate weight to our views. As a general rule, however, where there is a controlling legal standard for compensation we would not plan to inform the courts of the absence of foreign policy objections to adjudication of expropriation claims. Therefore, we would anticipate that silence on the part of the Executive in such cases would not be relied upon as a basis for judicial abstention under the Act of State Doctrine.

Sincerely,

/s/DAVID R. ROBINSON
David R. Robinson